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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 93-7490, 93-7546

Filed December 5, 1994

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of December, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE J. EDWARD LUMBARD,
HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE RALPH K. WINTER,
Circuit Judges.

MARJORIE ZICKERMAN, individually and as executrix under the estate of Muriel A.M.S. Kole; MURIEL MAHALEK, mother and next of kin of Muriel A.M.S. Kole,

Plaintiffs-Appellees/
Cross-Appellants,

MICHAEL KOLE,

Plaintiff,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendant-Appellant/
Cross-Appellee.

A petition for rehearing having been filed herein by counsel for appellant, Korean Air Lines Co., Ltd.

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied and the opinion filed November 3, 1994, is withdrawn, and an amended opinion is hereby filed.

IT IS FURTHER ORDERED that the judgment entered in the District Court for the Southern District of New York on April 12, 1993, and appealed from be, and it hereby is, affirmed in part, vacated in part, and remanded in part to the said District Court for further proceedings in accordance with the opinion of this Court.

GEORGE LANGE III, Clerk

By: [ILLEGIBLE]
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 93-7490, 93-7546

Filed January 20, 1995

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of January, one thousand nine hundred and ninety-five.

Marjorie Zickerman, individually and as executrix under the estate of Muriel A.M.S. Kole; Muriel Mahalek, mother and next of kin of Muriel A.M.S. Kole,

Plaintiffs-Appellees,
Cross-Appellants,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendant-Appellant/
Cross-Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Korean Air Lines Co., Ltd.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: CAROLYN CLARK CAMPBELL
Carolyn Clark Campbell,
Chief Duty Clerk

Relevant Provisions of The Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

49 Stat. 3019.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Article 25(1)

1. The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

* * *

49 Stat. 3020.

Article 28(2)

* * *

2. Questions of procedure shall be governed by the law of the court to which the case is submitted.

49 Stat. 3020.

Article 29(2)

* * *

2. The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

49 Stat. 3021.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States', the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.